Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1997

EUGENE MELODY,

Petitioner,

v.

BOROUGH OF EATONTOWN; EATONTOWN POLICE DEPARTMENT; JOSEPH PELELLA, CHIEF, Individually And Under Color Of State Law; JOHN DOES, 1-100; JANE DOES, 1-100; MARK ROES, 1-100, Unnamed Conspirators; JEROME BRADY, LT., (THEN DET. SGT.), Individually And Under Color Of State Law; MARY ROES, 1-100, Unnamed Conspirators,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below committed a fundamental error by finding that petitioner was precluded from seeking redress for a violation of his constitutional rights under 42 U.S.C. §1983 by virtue of a prior, unrelated state court proceeding that did not result in any final judgment on the merits as required by the full faith and credit clause, as well as New Jersey law.

2. Whether the court below committed a fundamental error in applying the full faith and credit clause to give preclusive effect to a prior unrelated state court proceeding that was voluntarily dismissed without prejudice and did not constitute a final judgment under New Jersey law and, therefore, was not entitled to any preclusive effect by the state in which the proceeding took place.

3. Whether the decision of the court below giving preclusive effect to a prior state court proceeding that was voluntarily dismissed without prejudice and prior to any adjudication is in direct conflict with the decisions of this Court in *Allen v. McCurry*, 449 U.S. 90 (1980) and *Migra v. Warren City School District Bd. Of Ed.*, 465 U.S. 75 (1984), and the decisions of numerous courts of appeal, including prior reported decisions of the Third Circuit and the decisions of New Jersey's court of last resort.

QUESTIONS PRESENTED FOR REVIEW – Continued

4. Whether the court below committed a fundamental error in permitting a New Jersey state procedural rule of claim preclusion to deprive petitioner of his federal right to seek redress for a violation of his constitutional rights, based upon a prior state court proceeding that was not entitled to preclusive effect under the full faith and credit clause or by the state in which the proceeding took place, in violation of the Supremacy Clause of the United States Constitution?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Eugene Melody ("Melody" or "petitioner") respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on April 14, 1998 in order to correct a manifest injustice resulting from a decision which operates to deprive petitioner of the ability and right to seek any redress for the egregious violation of his civil rights.

This case presents an important issue relating to the preclusive effect of a prior state court proceeding on an individual's right to seek redress for a violation of their federal civil rights under 42 U.S.C. §1983; specifically, whether a federal court, under the full faith and credit clause, can give preclusive effect to a prior state court proceeding that (1) did ***not*** result in any final judgment on the merits and was voluntarily dismissed ***without*** prejudice and prior to any adjudication, and (2) would ***not*** be entitled to preclusive effect by the state in which the proceeding took place.

The court below has so far departed from the accepted and usual course of judicial proceedings such that exercise of this Court's supervisory power is imperative and necessary to correct a manifest injustice.

The finding of the court below directly conflicts with this Court's prior decisions in *Allen v. McCurry*, 449 U.S. 90 (1980), *Migra v. Warren City School District Bd. Of Educ.*, 465 U.S. 75 (1984), the decisions of numerous courts of appeal and the decisions of New Jersey's state court of last resort.

Petitioner has unfairly and improperly been deprived of his ***right*** to seek redress for a violation of his civil rights and was penalized for exercising his right to have a federal forum entertain his claims where petitioner did not waive that right by litigating those claims or having had the opportunity to litigate them. The decision of the court below also permits a state procedural rule to deprive petitioner of his express federal right under 42 U.S.C. §1983 to seek redress for a violation of his constitutional rights in a federal forum, in violation of the Supremacy Clause of the United States Constitution.

OPINION AND ORDERS BELOW

There is no written Opinion of the United States Court of Appeals for the Third Circuit that gives rise to this petition. The decision of the Court of Appeals is reflected in an Order dated April 14, 1998, which is reprinted in the Appendix hereto ("App.") at pg. App. 19 and which affirmed the district court's Memorandum and Order dated March 26, 1997 which is reprinted in the Appendix at App. 1. By Order filed June 2, 1998, the Third Circuit denied the petition for rehearing and suggestion for rehearing *en banc*. App. 21.

JURISDICTION

On March 26, 1997, the United States District Court for the District of New Jersey issued a memorandum decision dismissing Melody's complaint in its entirety

and granting summary judgment in favor of the defendants.

On April 5, 1998, Melody filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit. On April 14, 1998, the Third Circuit entered an Order denying Melody's appeal and affirming the judgment and order of the district court.

On June 2, 1998, the Third Circuit denied Melody's timely filed petition for rehearing and suggestion for rehearing *en banc*. Pursuant to Supreme Court Rule 13.11, this petition has been filed within ninety (90) days of the denial of rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

CONSTITIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The following constitutional provisions and statutes are involved in this case and are set forth, in full, in the Appendix at App. 23-App. 26: Article IV, ¶1 of the United States Constitution; Article VI, Cl. 2 of the United States Constitution; 25 U.S.C. §1738; 42 U.S.C. §1983; and 42 U.S.C. §1985.

STATEMENT OF THE CASE

This case involves a series of civil rights violations and violations of other state and federal law, by former Chief of Police for the Borough of Eatontown, Joseph

Pelella against petitioner, Eugene Melody, a resident and practicing attorney in the State of New Jersey. The unlawful actions of Pelella arise out of an extramarital relationship that Pelella was having with Melody's then wife, Diane Melody, and Pelella's use and abuse of his authority, with the ratification of the Borough of Eatontown, to take actions designed to further his relationship with Mrs. Melody and to deprive petitioner of his rights under law.

The evidence reveals that Pelella embarked on a incredible course of behavior, during which Pelella flagrantly abused his authority in violation of departmental police procedures and law, for the purpose of assisting Diane in her domestic dispute with Melody and furthering his own relationship with Diane. Pelella's actions bespeak a man whose judgment had become so clouded by emotion to the point that Pelella was no longer concerned with the propriety and legality of his actions.

The ultimate abuse of Pelella's authority culminated on or about May 13, 1993. On that date, Pelella deliberately and callously utilized his authority for the sole purpose of furthering his personal relationship with Diane, by having Melody arrested and incarcerated on false charges that Melody allegedly made terrorist threats to kill Pelella. To support the charges, Pelella relied upon a telephone conversation that he had with Diane's treating psychologist, Dr. Sharon Kamm, as well as a conversation that Pelella had later that day with his wife, Cheryl Pelella. Pelella alleged that Dr. Kamm had warned Pelella that she was fearful that Melody would harm him and Diane.

As a result of the criminal charges that had been filed against Melody, he began to discover disturbing evidence relating to the charges that had been filed by Pelella against him. For instance, Melody learned that, on the day after his arrest, a report was first prepared by Detective Brady, presumably to justify the unlawful arrest. That report represented that Dr. Kamm had allegedly told Brady that Melody "could be mentally ill or homicidal, that he needed to be hospitalized and put on medication."

Upon learning of Kamm's alleged statement and believing that Kamm had not made such a statement as alleged by Brady, Melody confronted Kamm who failed to indicate whether or not she had made the statement. As a result of Kamm's refusal to take any action to withdraw the false statement, and concerned about the implications that such a statement could have on his professional reputation, Melody filed suit against Kamm in New Jersey Superior Court on October 23, 1993 for alleged professional negligence, asserting that Kamm breached her duty of care by negligently and recklessly making untrue statements.

During the course of that proceeding, various discovery motion practice took place with participation by, *inter alia*, attorneys for the Borough and Pelella. For instance, in response to a motion filed by Melody to compel compliance with a subpoena served by Melody on the Borough of Eatontown, Detective Brady was represented by

John Schuster, Esq., and the Borough of Eatontown was represented by John Boyle, Esq.[1]

During oral argument on that motion, both Messrs. Schuster and Boyle ***conceded*** that they were aware of Melody's intent to file a civil rights suit against the Borough of Eatontown. Indeed, both Schuster and Boyle attempted to ***limit discovery*** in the *Kamm* matter asserting that Melody was using the *Kamm* suit to obtain discovery to support his civil rights suit. In doing so, they argued that discovery should be limited because the issues in the *Kamm* matter were separate and distinct from the issues in the contemplated civil matter.[2]

Furthermore, discovery conducted during the course of the *Kamm* action revealed that Dr. Kamm did ***not*** make the statements attributed to her by Brady and that Brady's representations of those statements, which were used to support Melody's arrest, were not accurate.

In the interim, Melody consulted with and subsequently retained this firm, then known as the Law Offices of Linda B. Kenney, to pursue civil claims arising out of the events, including a claim under 42 U.S.C. §1983 for a violation of Melody's civil rights.

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[1] As discussed below, Mr. Boyle is the same attorney who subsequently assumed representation of the Borough in the instant matter.

[2] A copy of the letter brief filed by Mr. Boyle respective to the discovery motion in the *Kamm* action was provided to, *inter alia*, Pelella's counsel, Mr. Uliano, who also subsequently assumed representation of Pelella in the instant lawsuit.

Given Melody's constitutional right to seek a federal forum for the adjudication of his civil rights claims, so long as Melody's claims had not been previously adjudicated in the state court proceeding, (*see Allen v. McCurry*, 449 U.S. 90 (1980)), on May 18, 1994, Melody's lawyers filed the instant action in the United States District Court asserting claims against Pelella, the Borough of Eatontown and Detective Jerome Brady alleging, *inter alia*, a violation of Mr. Melody's civil rights. Jurisdiction in the district court was founded upon 28 U.S.C. §1331 in that plaintiff's complaint asserted claims under 42 U.S.C. §1983 and 42 U.S.C. §1985.

Answers were filed on behalf of all of the respective defendants in the federal action including Pelella, the Borough and Brady. An appearance was entered and an Answer filed on behalf of the Borough by Mr. Boyle, the ***same*** attorney that represented the Borough in the ***state*** action. An appearance was also entered and an Answer was filed on behalf of Pelella by Charles Uliano, also the ***same*** attorney that had represented Pelella in the ***state*** action.

Notwithstanding the fact that the attorneys retained to represent the defendants in the instant matter indisputedly knew about the *Kamm* lawsuit, which was pending at the time the instant lawsuit was filed, ***none*** of the defendants asserted that the pending state court proceeding acted to bar the instant matter and the entire controversy doctrine, New Jersey's rule of claim and issue preclusion, was not pled as an affirmative defense in ***any*** of the Answers filed on behalf of ***any*** of the defendants.

Recognizing that the state court proceeding had not been adjudicated and concluding that there was no longer any basis to pursue an independent claim against Kamm, Melody ***voluntarily*** dismissed his state court proceeding against Kamm by signing a "stipulation of dismissal ***without prejudice***" on September 15, 1994.

Consistent with New Jersey law, the voluntary dismissal of the state action "without prejudice" and prior to any adjudication, did ***not*** constitute a final judgment. *See Woodward-Clyde Consultants v. Chemical & Pollution Sciences, Inc.*, 105 N.J. 464, 523 A.2d 131 (1984); *Christiansen v. Christiansen*, 46 N.J. Super. 101 (App. Div.), 134 A.2d 14 (1975). Therefore, consistent with this Court's decision in *Migra v. Warren City School District Bd. Of Ed.*, 465 U.S. 75 (1984), Melody retained the ability and right to pursue his claims, including his constitutional claims under 42 U.S.C. §1983, in his pending federal lawsuit, since the state court proceeding did not constitute a final judgment under New Jersey law and was not entitled to preclusive effect under the full faith and credit clause.

Moreover, at the time of the voluntary dismissal of the state proceeding, it was understood that Melody intended to pursue his civil rights and related claims that had been asserted in the instant matter in federal court. In fact, notwithstanding the voluntary dismissal without prejudice of the state court proceeding, Melody retained the ability to include Kamm in the instant matter should discovery indicate that there was a basis for a claim against Kamm.

On May 18, 1995 an amended complaint was filed in the instant matter. Answers to the amended complaint were filed by the defendants and ***again***, did ***not*** assert that the instant matter was barred by the prior state court proceeding and did ***not*** plead New Jersey's rule of claim and issue preclusion, the entire controversy doctrine, as an affirmative defense.

However, after almost two (2) years of discovery and litigation, and apparently as an afterthought, defendants filed a motion for summary judgment arguing that plaintiff was barred from pursuing his claims in the instant matter based upon the entire controversy doctrine. Defendants asserted that Melody was precluded from seeking redress in federal court based upon the prior state court proceeding.

In opposition to defendants' motion for summary judgment, Melody emphasized that the state court *Kamm* lawsuit could ***not*** operate to preclude Melody from seeking redress in the instant matter as it had been ***voluntarily dismissed*** by stipulation ***"without prejudice"*** prior to any adjudication and never resulted in a final judgment on the merits as required by both the New Jersey entire controversy doctrine as well as the full faith and credit clause. Melody emphasized that the federal court could not give preclusive effect to a prior state court proceeding that would ***not*** be entitled to preclusive effect by the state in which the proceeding took place, as required by both this Court's precedent, as well as the full faith and credit clause.

To do so, Melody argued, would deprive him of his federal right to seek redress for a violation of his constitutional right in federal court and would permit a state court procedural rule to supersede Melody's federal

rights under 42 U.S.C. §1983, in violation of the Supremacy Clause of the United States Constitution.

Nevertheless, by Order and Opinion dated March 26, 1997, the Honorable Mary Little Parell dismissed Melody's entire complaint, including his federal claims, finding that they were barred by New Jersey's entire controversy doctrine. In doing so, the court found that the prior lawsuit that Melody had filed in New Jersey Superior Court against Kamm operated to bar Melody from pursuing the instant claims and that pursuant to the full faith and credit clause, the court was required to give preclusive effect to the prior state proceeding.

Although no claims were adjudicated in the state court proceeding and, although the state court proceeding was voluntarily dismissed without prejudice and without any adjudication whatsoever, much less a final judgment on the merits, the court below found that plaintiff's claims in the instant matter were barred.

In a discussion confined to a mere *footnote*, the district court summarily rejected Melody's argument that the full faith and credit clause could not operate to preclude his claims based upon the prior state court proceeding since the prior state court proceeding had been dismissed without prejudice and without any final judgment on the merits. The court failed to address Melody's assertion that application of New Jersey's state procedural rule to deprive him of the right to seek redress for a violation of his constitutional rights violated the Supremacy Clause of the United States Constitution, as well as this Court's prior decisions.

The Third Circuit denied, without opinion, Melody's appeal. Upon petitioning for a rehearing, Melody emphasized that the district court's finding that his claims were barred by the entire controversy doctrine was based on the erroneous conclusion that the prior state court proceeding resulted in a final judgment on the merits, which it did not.

However, the Third Circuit failed to address petitioner's contention and Melody's petition for rehearing and suggestion for rehearing *en banc* were denied.

REASONS WHY THE PETITION SHOULD BE GRANTED

POINT I

THE COURT BELOW COMMITTED A FUNDAMENTAL ERROR IN FINDING THAT PETITIONER WAS PRECLUDED FROM SEEKING REDRESS FOR A VIOLATION OF HIS CONSTITUTIONAL RIGHTS UNDER 42 U.S.C. §1983 BASED UPON A PRIOR UNRELATED STATE COURT PROCEEDING THAT WAS VOLUNTARILY DISMISSED WITHOUT PREJUDICE, PRIOR TO ANY ADJUDICATION AND THAT DID NOT CONSTITUTE A FINAL JUDGMENT ON THE MERITS, UNDER NEW JERSEY LAW, IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN *ALLEN v. McCURRY*, 449 U.S. 90 (1980) AND *MIGRA v. WARREN CITY SCHOOL DISTRICT BD. OF ED.*, 465 U.S. 75 (1984), NUMEROUS COURTS OF APPEAL AND NEW JERSEY'S COURT OF LAST RESORT.

a. An Individual Has An Express Right To Seek Redress In A Federal Forum For A Violation Of His Constitutional Rights Under 42 U.S.C. §1983.

Under federal law, an individual has an express right to seek redress in a federal forum for alleged constitutional

deprivations under 42 U.S.C. §1983. The significance of the right to a federal forum within which to adjudicate federal civil rights claims was underscored by this Court in *Monroe v. Pape*, 365 U.S. 167 (1961). Recognizing that Congress passed 42 U.S.C. §1983 in order to substitute a federal forum for existing state law remedies, the Court stated as follows:

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Id. at 180 n.10.

This emphasized that the goal of the legislation was to give a separate remedy under federal law no matter what the circumstances of state law, stating that "[i]t is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.* at 183.

In *McNeese v. Bd. Of Educ.*, 373 U.S. 668 (1963), this Court recognized that 42 U.S.C. §1983 gives a plaintiff an independent and supplemental cause of action and the right to choose the federal court as the preferred forum for the assertion of constitutional claims. The Court emphasized the significance of the federal right to seek redress in a federal forum for a violation of constitutional rights notwithstanding the availability of other forums

and noted that human rights under the federal constitution are always the proper subject for adjudication and that the federal courts "have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum." *McNeese*, 373 U. S. at 674 n. 5 (*quoting Stapleton v. Mitchell*, 60 F. Supp. 51, 55, *appeal dismissed pursuant to stipulation*, 326 U.S. 690 (1945)).

In *Mitchum v. Foster*, 407 U.S. 225 (1972), this Court reiterated the effect of §1983 upon state and federal relations stating:

> Section 1983 was thus a product of vast transformation from the concepts of federalism that had prevailed in the late 18th century . . . The very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'

Id. at 242 n.11 (*quoting Ex parte Virginia*, 100 U.S. 339, 346 (1879).

The Court also stated:

> This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.

Monroe, 407 U.S. at 242.

b. Under The Full Faith And Credit Clause, A Litigant Is Only Precluded From Seeking Redress For A Violation Of His Constitutional Rights In Federal Court Under 42 U.S.C. §1983 When The Litigant Has Actually Litigated His Federal Claim In A Prior State Court Proceeding Or Where The Claim Could Have Been Raised In A Prior State Court Proceeding That Resulted In A Final Judgment On The Merits.

While the right to a federal forum was well-established, it was unclear as to whether and to what extent, if any, that right extended to an individual who previously sought and obtained relief in a non-federal forum. In *Allen v. McCurry*, 449 U.S. 90 (1980), the Supreme Court clarified the nature and extent of an individual's right to litigate a constitutional issue in a federal forum where that issue was "actually litigated" in a prior state court proceeding.

In *Allen*, the Court held that a claimant could be precluded from seeking redress in federal court for a violation of their federal rights under 42 U.S.C. §1983 where the claimant had been involved in a prior state court proceeding in which those claims had been "actually litigated" and which resulted in a final judgment on the merits. This Court held that under the full faith and credit clause, a federal court must give preclusive effect to a prior state court judgment to the same extent that preclusive effect would be given that judgment under the law of the state in which the judgment was rendered.

Allen thus made it clear that issues "actually litigated" in a state court proceeding are entitled to the same preclusive effect in a subsequent federal §1983 action as

they enjoy in the courts of the state where the judgment was rendered. The Court held that where a party submits his federal claim for decision by the state courts and litigates them there, he will not be permitted to relitigate those claims again in federal court. *Id.* at 96 n.10.

Justice Blackmun, dissenting from the court's finding in that case that the petitioner's claim was barred by principles of collateral estoppel, emphasized that a litigant in a §1983 case may be precluded by prior litigation "if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there. . . . " *Id.* at 112 (*quoting England v. Louisiana State Bd. Of Medical Examiners*, 375 U.S. 411, 419 (1964)). When a party does so, "he has elected to forgo his right to return to the District Court." *Id.*

The court in *Allen*, however, left unanswered the question as to whether a federal court applying the full faith and credit clause could give preclusive effect to a prior state court proceeding in which a federal claim was not "actually litigated" but could have been and that proceeding resulted in a final judgment on the merits.

Four years later in *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984), this Court addressed the question that was left open in *Allen*. In *Migra*, petitioner filed suit against her employer in Ohio Court of Common Pleas alleging that by voting not to renew her teaching contract, the defendants breached a contract and wrongfully interfered with her employment.

Petitioner's claims were litigated in the trial court which found in her favor and awarded her damages and

entered a final judgment on the merits. The ruling was appealed and affirmed by the Ohio Court of Appeals. The Ohio Supreme Court denied review.

Thereafter, petitioner filed an action in federal district court under 42 U.S.C. §1983 alleging that the defendants' decision not to renew her contract was taken in retaliation for her activities in, *inter alia*, organizing a desegregation plan. The district court granted summary judgment on the basis of *res judicata* and dismissed the case.

Upon certiorari to the Supreme Court, the Court held that under the full faith and credit clause, the federal court was required to give preclusive effect to the prior state court judgment to the same extent that preclusive effect would have been given by the state in which it was rendered, even where it deprived the litigant of her right to seek redress in federal court under 42 U.S.C. §1983.

Having found in *Allen* that an ***issue*** that had been "actually decided" in a state court proceeding was entitled to preclusive effect in a §1983 suit and barred a litigant from reasserting ***issues*** that had been "actually litigated" in the prior proceeding, the Court concluded that the full faith and credit clause also required giving preclusive effect to ***claims*** that could have been raised but had not been raised, but ***only*** to the extent that such claims would be precluded by the prior state court judgment under the law of the state in which it was rendered.

c. The Court Below Erred In Giving Preclusive Effect, Under The Full Faith And Credit Clause, To A Prior State Court Proceeding That Resulted In No Final Judgment On The Merits And Was Not Entitled To Preclusive Effect Under New Jersey Law.

In accordance with the foregoing principles, and with this Court's decisions in *Allen* and *Migra*, the court below was required to determine the extent to which Melody's prior state court proceeding, that was voluntarily dismissed without prejudice and prior to any adjudication, constituted final judgment on the merits and would be entitled to preclusive effect ***under New Jersey law***.

Neither *Allen* nor *Migra* held that an individual would or could be precluded from seeking redress for a violation of their civil rights based upon a prior state court proceeding that involved no adjudication or final judgment. Indeed, central to the holdings in both *Allen* and *Migra* was the recognition that a prior state proceeding could ***only*** be given preclusive effect by a federal court to the extent that there had been (1) a ***final judgment*** in the state court proceeding, as required by the full faith and credit clause, and (2) ***only*** to the extent that such a judgment was entitled to preclusive effect by the state in which the judgment was entered. Thus, where the prior state court proceeding did not result in any judgment that would be entitled to preclusive effect by the state in which it was rendered, the full faith and credit clause does not justify or permit the federal court to honor such a judgment.

Under New Jersey law, only a valid "final judgment on the merits" will preclude further litigation on the same

or related cause of action under the entire controversy doctrine. *Malhame v. Borough of Demarest*, 174 N.J. Super. 28 (App. Div.) 415 A.2d 358 (1980); *Christiansen v. Christiansen*, 46 N.J. Super. 101 (App. Div.) 134 A.2d 14 (1957). In that regard, it is clear that Melody's prior state court proceeding, that was dismissed without prejudice, did not constitute a final judgment on the merits under New Jersey law.

In *Woodward-Clyde Consultants v. Chemical & Pollution Sciences, Inc.*, 105 N.J. 464, 472, 523 A.2d 131, 134 (1984), the New Jersey Supreme Court clearly and unequivocally held that "[a] dismissal without prejudice is ***not*** an adjudication on the merits" and therefore, lacks preclusive effect in a later action. (emphasis added) In that case, the court found that a second suit instituted by plaintiff, which asserted claims that had been the subject of a counterclaim that was dismissed "without prejudice," was ***not*** precluded by the entire controversy doctrine.

In doing so, the Court referred to the decision of the New Jersey Appellate Division in *Christiansen v. Christiansen*, 46 N.J. Super. 101 (App. Div.) 134 A.2d 14 (1957), where the court concluded that a later action was ***not*** barred by the entire controversy doctrine where an earlier action had been dismissed without prejudice. The court in *Christiansen* emphasized that ***"[a] dismissal without prejudice is comparable to a nonsuit under the former practice at law. It adjudicates nothing. Another action may be instituted and the same facts urged, either alone or in company with others, as the basis for a claim for relief."*** *Christiansen*, 134 A.2d at 18. (citations omitted) (emphasis added)

In *Venuto v. Witco*, 117 F.3d 754 (3d Cir. 1995), the Third Circuit, applying the decisions in *Woodward-Clyde* and *Christiansen*, held that under New Jersey law, a dismissal without prejudice does ***not*** constitute an adjudication on the merits and does ***not*** operate to preclude a later action under New Jersey's entire controversy doctrine.

In affirming the district court's finding that a second of two related law suits was not barred by the entire controversy doctrine, the Court of Appeals held that, based upon the decisions of the New Jersey courts in *Woodward-Clyde* and *Christiansen*, "[it] ***therefore seems plain that New Jersey courts recognize that a dismissal of a claim without prejudice removes the claim from a res judicata bar.***" *Id.* at 761. (emphasis added) Noting that the Second, Fourth, Fifth, Sixth and Seventh Circuits have all recognized that a dismissal of a claim without prejudice does not operate to bar a second action, the Court of Appeals found that the same result was required under New Jersey state law.

In the case at bar, to support its finding that the voluntary dismissal of Melody's prior state proceeding without prejudice operated as a final judgment sufficient to preclude Melody from pursuing his federal claims, the district court relied exclusively on a mere passing reference, *in dicta*, in the decision of a district court in *Hulmes v. Honda Motor Co.*, 924 F.Supp. 673 (D.N.J. 1996) where the court held that the New Jersey entire controversy doctrine did ***not*** operate to bar plaintiff's claim based upon a prior state court proceeding that had been dismissed "with prejudice."

However, it was clearly erroneous for the court below to conclude that merely because the court in *Hulmes* found, under the facts of that case, that a subsequent proceeding was ***not*** barred under New Jersey law based upon a prior proceeding that was dismissed "with prejudice," that under New Jersey law, a dismissal "without prejudice" operates to bar a subsequent proceeding.

As noted previously and as recognized by the Third Circuit in *Venuto*, it is clear that under New Jersey law, a dismissal "without prejudice" is ***not*** deemed to be an adjudication on the merits and does not operate to bar reinstatement of the same claim in a later action. Indeed, the Third Circuit in *Venuto* recognized the fact specific nature of the district court's holding in *Hulmes*, noting that the court's finding was based, in part, on the fact that use of the phrase "with prejudice" by the plaintiff in the prior proceeding had been "inadvertent." *Venuto*, 117 F.3d at 760.

Thus, contrary to the finding of the court below in the case at bar, the holding of the court in *Hulmes* did not establish any new legal principle regarding the effect of a dismissal "with prejudice" nor did the court's ruling support a rule of law that a dismissal "without prejudice" can preclude a later action.

In the case at bar, Melody's prior state court proceeding was never adjudicated and did not result in any final judgment on the merits as required by *Migra*. Plaintiff's civil rights complaint in the case at bar did not seek to assert claims that had previously been adjudicated under

a different legal theory as in *Allen*. Where the prior proceeding was dismissed by stipulation of the parties, without prejudice, prior to any adjudication, and for the express purpose of affording plaintiff the ability to exercise his federal right to seek redress in a federal forum, he cannot be precluded from pursuing his claims in federal court.

Courts have recognized that where the state court record fails to reveal the precise basis of its decision, leaving open even the ***possibility*** of adjudication not on the merits, judgment will not be treated as *res judicata* in federal court. *Local No. 1 Broadcast Emples. of the Intl. Bhd. v. International Bhd. of Teamsters*, 419 F.Supp. 263 (D.Pa. 1976). Based upon the foregoing, the court below committed a manifest error in applying the full faith and credit clause to a prior state court proceeding that did not involve any adjudication of plaintiff's claims and did not result in any "final judgment on the merits" as required by New Jersey's entire controversy doctrine, as well as the full faith and credit clause.

POINT II

THE HOLDING OF THE COURT BELOW IS NOT ONLY DIRECTLY CONTRADICTED BY NEW JERSEY'S HIGHEST COURT OF LAST RESORT, BUT ALSO BY THE HOLDINGS OF NUMEROUS COURTS OF APPEALS WHICH HAVE HELD THAT A VOLUNTARY DISMISSAL WITHOUT PREJUDICE IS NOT A FINAL JUDGMENT AND LACKS PRECLUSIVE EFFECT.

The finding of the court below not only directly contradicts the decisions of New Jersey's court of last

resort, as well as the decision of the Third Circuit in *Venuto*, it is also directly inconsistent with the decisions of numerous other courts that have held that a dismissal "without prejudice" is not a final judgment on the merits and lacks preclusive effect.

For example, in *Hernandez v. Calero*, 576 F.2d 402 (1st Cir. 1978), the First Circuit held that a prior state proceeding that did not result in an adjudication of plaintiff's claims on the merits, could not preclude plaintiff from seeking redress for a violation of his constitutional rights in federal court. In doing so, the court stated that "where a valid and final personal judgment not on the merits is rendered . . . the plaintiff is not thereby precluded from thereafter maintaining an action as to the original cause of action . . . " *Id.* at 404.

Furthermore, as recognized by the Third Circuit in *Venuto*, several circuits, including the Second, Fourth, Fifth, Sixth and Seventh Circuits have all recognized that a dismissal without prejudice does not operate to preclude a subsequent action. *See Venuto*, 117 F.3d at 759; *see also Guzowski v. Hartman*, 849 F.2d 252, 255 (6th Cir. 1988) (noting that a dismissal without prejudice permitted the plaintiff to file a new complaint); *Torres v. Rebarchak*, 814 F.2d 1219, 1225 (7th Cir. 1987) (finding that plaintiff's voluntary dismissal of damage claims "without prejudice" in a prior proceeding could not preclude plaintiff from seeking damages in a later federal civil rights suit); *Stolberg v. Trustees for the State Colleges of Connecticut*, 541 F.2d 890, 893 (2d Cir. 1976) ("If the underlying judgment had explicitly provided that [a particular] issue had not been litigated and the defendants were not precluded from raising it, there would be no question" that *res*

judicata would not bar a second suit.); *Blackwelder v. Millman*, 522 F.2d 766, 773 (4th Cir. 1975) (finding that denial of a motion without prejudice did not preclude plaintiff from asserting claims by way of a separate action); *U.S. v. Seckinger*, 408 F.2d 146, 148-49 (5th Cir. 1964), *rev'd on other grounds*, 397 U.S. 203 (1970) (the dismissal without prejudice of prior actions does not serve as a formal adjudication on the merits so as to bar a later action); *Maryland v. Lathan*, 41 F.2d 312 (5th Cir. 1930).

Independent research has also disclosed that the decision of the court below is also in conflict with the decisions of the courts of appeals for the District of Columbia, the Eighth Circuit and the Ninth Circuit. *See Bruns v. National Credit Union Administration*, 122 F.3d 1251, 1258 (9th Cir. 1997) (the district court's dismissal of a prior action without prejudice was not a final judgment on the merits and could not preclude a later federal action); *In re American Continental Corp.*, 102 F.3d 1524, 1535 (9th Cir. 1996) (same); *In re Corey*, 892 F.2d 829, 835 (9th Cir. 1989), *cert. denied*, 498 U.S. 815 (1993) (dismissal without prejudice lacks *res judicata* effect); *Interdonato v. Interdonato*, 521 A.2d 1124, 1131 n.11 (D.C. 1987) ("The crucial element of *res judicata* is a final judgment on the merits and it is beyond dispute that a dismissal without prejudice does not determine the merits."); *Curtis v. United Transp. Union*, 648 F.2d 492, 495 (8th Cir. 1981) (the effect of a dismissal without prejudice is to put the plaintiff in a legal position as if he had never brought the first suit); *see also Tannie v. Chamberlain Manuf. Corp.*, 445 F.Supp. 65, 74 (W.D. Pa. 1977) (where complaint was dismissed without prejudice, plaintiff was free to refile the action).

The decision in the case at bar is also in direct conflict with leading authorities, that have specifically held that a voluntary dismissal of an action does not result in a final judgment on the merits and lacks *res judicata* effect. Leading authorities have recognized that the voluntary dismissal of the prior proceeding voids all proceedings and orders in that action. *See generally*, 9 Charles Wright & Arthur Miller, Federal Practice & Procedure §2367, at 186 (a voluntary dismissal without prejudice leaves the situation as if the act had never been filed); *Restatement (Second) of Judgments*, §20 (1980) (the withdrawal of a motion is analogous to a voluntary dismissal without prejudice which does not bar a subsequent action in the same claim).

Consistent with those authorities, the Ninth Circuit Court of Appeals, in *PaineWebber v. Bahr*, 1996 U.S. App. LEXIS 25314 (9th Cir. 1996), held that a state court proceeding, which had been voluntarily dismissed by plaintiff, did not preclude a later suit in federal court between the same parties. In doing so, the court noted that plaintiff's voluntary dismissal of his first action "voided all proceedings and orders in that action." *Id.* at *1. The court held that there was no final judgment on the merits and therefore, the federal claim could not be precluded.

Based upon the foregoing, and because the decision of the court below is in conflict with the decisions of numerous other courts of appeals, in addition to leading authorities, certiorari by this Court is imperative to address this conflict among the circuits.

POINT III

APPLICATION OF NEW JERSEY'S ENTIRE CONTROVERSY DOCTRINE, A STATE PROCEDURAL RULE, TO DEPRIVE A LITIGANT OF THE FEDERAL RIGHT TO SEEK REDRESS FOR A CONSTITUTIONAL DEPRIVATION, BASED UPON A PRIOR STATE COURT PROCEEDING THAT RESULTED IN NO FINAL JUDGMENT OR ADJUDICATION ON THE MERITS, VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

The Supremacy Clause of Article VI of the United States Constitution forbids a state from taking any action to "retard, impede, burden or in any manner control, the operations of the constitutional laws enacted by Congress to carry [that power] into execution. *United States Term Limits v. Ray Thornton*, 514 U.S. 779, 931 (1994) (*citing McCulloch v. Maryland*, 17 U.S. 316, 436 (1819)). If a state law or rule regulates conduct that is actually protected by federal law, the state law or rule is preempted as a matter of substantive right. *Brown v. Hotel & Restaurant Employees*, 468 U.S. 491, 508 (1984). This Court has held that where a state rule conflicts with a federal enactment, "[the] relative importance to the state of its own laws is not material . . . for the framers of our Constitution provided that the federal law must prevail." *Free v. Bland*, 369 U.S. 663, 666 (1962).

As noted previously, 42 U.S.C. §1983 expressly affords an individual a right to seek redress in a federal forum for alleged constitutional deprivations, as limited by subsequent judicial decisions of this Court. It is true that under the full faith and credit clause, a federal court is required to give preclusive effect to a prior state court

judgment to the same extent such judgment would be given preclusive effect by the state in which it was issued, even if giving preclusive effect to such a judgment interferes with a litigant's ability to bring a later claim under §1983 in federal court. *See Migra*, 465 U.S. at 75; *Allen*, 449 U.S. at 90.

However, where a prior state court proceeding did not result in a final judgment and would ***not*** be entitled to preclusive effect by the state in which it took place, the full faith and credit clause does not justify or permit giving preclusive effect to such a proceeding.

More importantly, to give preclusive effect to such a proceeding, would result in a direct conflict between the state rule and the express rights of a litigant under 42 U.S.C. §1983 to seek redress in a federal forum in violation of the Supremacy Clause.

In the case at bar, the court below has applied the New Jersey entire controversy doctrine, a state procedural rule of claim and issue preclusion, to deprive petitioner of his federal right to seek redress in a federal forum for a violation of his constitutional rights, based upon a prior state court proceeding that did not result in any final judgment on the merits and involved no adjudication of plaintiff's claims as required by New Jersey law.

By permitting a New Jersey state procedural rule of law to abrogate Melody's federal constitutional rights, the district court's interpretation and application of the entire controversy doctrine permits the ***state*** rule of claim and issue preclusion to deprive plaintiff of his ***federal*** right to pursue his constitutional claims in federal court and violates the Supremacy Clause of the United States

Constitution. This Court has previously stricken state procedural rules that have operated to deprive a citizen of fundamental rights and liberties. *See Harper v. Virginia Bd. Of Education*, 383 U.S. 663 (1966) (finding that Virginia's establishment of a poll tax as a prerequisite to voting violated the fundamental right to vote guaranteed by the U.S. Constitution).

To the extent that the entire controversy doctrine is applied to preclude a litigant, such as Melody, from obtaining redress for a violation of his constitutional rights based upon a prior state court proceeding that did ***not*** result in any final judgment and does not constitute a final judgment by the laws of the state in which that proceeding took place, the entire controversy doctrine usurps the rights expressly granted under 42 U.S.C. §1983 in violation of the Supremacy Clause. The application of New Jersey entire controversy doctrine to Melody and any other citizen of New Jersey, under these circumstances, is unjust and plainly unconstitutional.

CONCLUSION

The instant petition presents a compelling issue of national importance regarding the extent to which the right of an individual to seek redress for a violation of their constitutional right can be affected by a prior state court proceeding that involved no adjudication and resulted in no final judgment on the merits. The decision of the court below directly conflicts with this Court's prior decisions in *Allen* and *Migra*, as well as numerous courts of appeals and New Jersey's court of last resort.

Not only is the decision of the court below not justified or warranted by application of the full faith and credit clause, it violates the Supremacy Clause by permitting a state court procedural rule to deprive the petitioner of his federal rights under 42 U.S.C. §1983 based upon a state court proceeding that did not constitute a final judgment and was not entitled to preclusive effect under New Jersey law.

If left undisturbed, the decision of the court below will establish a dangerous and unconstitutional precedent resulting in a manifest injustice not only to Melody, but to citizens throughout this country. Accordingly, it is respectfully requested that certiorari is necessary to correct the fundamental errors committed by the court below and should be granted.

Respectfully submitted,

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Dated: August 19, 1998

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

EUGENE MELODY, Plaintiff v. BOROUGH OF EATONTOWN, EATONTOWN POLICE DEPARTMENT, JOSEPH PELELLA, and JEROME BRADY, Defendants.	:	CIVIL ACTION NO: 94-2453 (MLP) **MEMORANDUM AND ORDER** (Filed Mar. 26, 1997)

PARELL, District Judge

This matter is before the Court on (1) motion of defendant Jerome Brady ("Brady") to dismiss the Complaint or, in the alternative, for summary judgment; (2) motion of defendants Borough of Eatontown ("Eatontown") and Joseph Pelella ("Pelella") to dismiss the Complaint or, in the alternative, for summary judgment; (3) motion of plaintiff Eugene Melody ("Melody") for partial summary judgment; and (4) motion of defendants Eatontown, Pelella, and Brady for partial summary judgment. For the reasons stated in this Memorandum and Order, the motions of defendants Eatontown, Pelella, and Brady for summary judgment are granted; the motion of plaintiff for partial summary judgment is denied; and the motion of defendants Eatontown, Pelella, and Brady for partial summary judgment is dismissed as moot.

BACKGROUND

Plaintiff commenced this civil rights action on May 18, 1994. Subsequently, on May 18, 1995, Melody filed an Amended Complaint. Plaintiff, an attorney, was the prosecutor for the Borough of Eatontown. (Am. Compl. ¶ 11.) Defendant Pelella is the Chief of Police of the Eatontown Police Department. (*Id.* ¶ 6.) Defendant Brady is an Eatontown police officer. (*Id.* ¶ 7.)

In early November, 1992, plaintiff learned that his wife, Diane Melody ("Diane"), was having an affair with defendant Pelella and wanted a divorce. (*Id.* ¶ 16(b) and (c).) Several days after learning of the affair, Melody resigned as prosecutor for Eatontown. (*Id.* ¶ 16(d).) On November 28, 1992, Melody removed his personal belongings and left the marital home. (*Id.* ¶ 16(g).)

On December 2, 1992, plaintiff obtained a Temporary Restraining order ("T.R.O.") that allowed Pelella to be a social guest at the Melody marital home no more than two days per week. (*Id.* ¶ 16(h); Ex. A.) On January 22, 1993, Melody filed a police report stating that Pelella had visited the marital home three days in a row, thus violating the terms of the T.R.O. (*Id.* ¶ 16(j).) Plaintiff alleges that no action was taken against Pelella for this violation. (*Id.*)

In March of 1993, Diane filed a report alleging that Melody had harassed her. (*Id.* ¶ 16(n); Ex. G.) Plaintiff alleges that on May 7, 1993, Diane went to Pelella's office to tell him that she was upset that Melody was filing police reports. (*Id.* ¶ 16(p).) Melody claims that Pelella handwrote a police report against Melody and then ordered an officer to type up the report and submit it in

the officer's name. (*Id.*) Plaintiff further alleges that Pelella ran a license check on him, and that Pelella admitted as much when he was deposed in the Melodys' divorce proceeding. (*Id.* ¶ 16(q).)

Plaintiff alleges that

> [p]erhaps one of the most egregious abuses of power which took away Melody's constitutional rights regarding an alleged telephone call made to Dr. Sharon Kamm, who was a treating psychologist for Diane and Mr. Melody's children. Allegedly, according to the police reports dated May 20, 1993 and signed by Lt. (then Det.) Jerome Brady . . . it is alleged that Dr. Kamm told Brady that she felt that Melody could be mentall [sic] or homicidal, and that she believes he needed to be hospitalized and placed on medication. As a direct result thereof, Melody filed suit against Dr. Kamm in a superior Court action for malpractice. . . . However, during the depositions of Dr. Kamm in the malpractice action Dr. Kamm admitted that the statements made up by Brady in the police reports are just that – made up statements, that she never complained that Melody [sic] homicidal or mentally [sic], that he needed to be hospitalized or placed on medication. As a result of the alleged statements made by Dr. Kamm, Pelella gave the order to arrest Melody, had him incarcerated, and deprived him of his life, liberty and constitutional rights for false reasons as a cover up for his personal animosity against Melody and his relationship with Melody's wife, Diane. During that period where the case was under investigation, Pelella directed the investigation.

(*Id.* ¶ 16(r).)

While Melody was incarcerated, his telephone calls were automatically recorded on the Police Department's master tape. (*Id.* ¶ 16(s).) Plaintiff alleges that Pelella extracted a tape of his phone calls and gave the tape to Detective Clayton. (*Id.* ¶¶ 16(s), 16(t).)

In June, 1995, Pelella learned that Diane was involved with "Richard Jones of the Eatontown roller rink." (*Id.* ¶ 16(u).) Melody alleges that Pelella used "a marked police car on taxpayer time and expense to stake-out Diane and Richard Jones." (*Id.* Thereafter, Pelella called J.R. Fiorino, Esq.[1] and told him that he wanted to drop all charges against Melody. (*Id.*) Pelella demanded that Melody sign a release as a precondition of dismissing the charges against him. (*Id.*) After the release was signed on August 3, 1993, Pelella "caused the charges to be dismissed." (*Id.* ¶ 16(v).)

On October 25, 1993, Melody filed an action against Dr. Sharon Kamm ("Dr. Kamm"), alleging that Dr. Kamm "negligently, inaccurately and without reasonable care, ma[de] a public diagnosis and course of treatment which was unfounded, inaccurate and reckless." (Certif. of Charles J. Uliano, Esq., Ex. B: Compl. in *Melody v. Kamm*, Docket No. L 6002-93.) On April 20, 1994, Melody deposed defendant Brady as a non-party witness in *Melody v. Kamm*. (Uliano Certif., Ex. H.) The action was dismissed without prejudice by stipulation of the parties in September, 1994. (Uliano Certif., Ex. K.)

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[1] Although it is not clear from the Amended Complaint, it appears that Mr. Fiorino was Melody's attorney.

On December 3, 1994, Melody filed a complaint against Diane, alleging that Diane "willfully intercepted and recorded telephone calls from or to the Plaintiff." (Uliano Certif., Ex. D: Compl. in *Melody v. Melody*, Docket No. L 6762-93.) Plaintiff alleged that Diane had acted "on behalf of, in cooperation with, with the consent of, as the agent of or with the knowledge of Joseph Pelella, Chief of Police of Eatontown, New Jersey in an attempt or with the hope or expectation that the elicit [sic] recordings would further a criminal investigation wherein the Plaintiff was a target." (*Id.*) Melody filed an Amended Complaint in *Melody v. Melody* on January 10, 1994. (Uliano Certif., Ex. E: Am. Compl. in *Melody v. Melody*.) Plaintiff added a second count which alleged that Diane, "between May 19, 1993 and June 4, 1993 and at other times, made one or more recordings of a psychiatrist or psychologist" in violation of New Jersey law. (*Id.*) This action was dismissed by stipulation pursuant to a Dual Final Judgment of Divorce. (Uliano Certif., Ex. L; Certif. of Eugene J. Melody, Exs. F and G.)[2]

Melody commenced this action in federal court an May 18, 1994. On May 18, 1995, plaintiff filed an Amended Complaint, which contains seventeen counts under the following headings: (1) 42 U.S.C. § 1983; (2)

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[2] It is unclear when this stipulation of dismissal was filed. Melody apparently signed the stipulation in December of 1994. (Melody Certif., Ex. F.) The space for the signature of Diane's attorney, however, is blank. (*Id.*) The signatures of both Melody and Diane's attorney appear on a copy of the stipulation dated June 3, 1996. (Melody Certif., Ex. G.)

conspiracy under § 1983; (3) the United States Constitution; (4) the New Jersey Constitution; (5) negligent supervision; (6) negligent retention of an officer; (7) falsification of police reports; (8) negligent and/or intentional interference with prospective economic advantage; (9) malicious use of process; (10) malicious abuse of process; (11) negligent training; (12) invasion of privacy; (13) spoilation of evidence; (14) conspiracy to violate state law; (15) failure to prevent a conspiracy under 42 U.S.C. § 1986; (16) "public policy request to void settlement and hold same in escrow/request for release of minutes under the Sunshine Law;" and (17) federal and state wiretap laws. (Am. Compl.)

In support of his motion to dismiss or, in the alternative, for summary judgment, defendant Brady argues that: (1) plaintiff's action is barred by the entire controversy doctrine, (Def. Brady's Br. at 3-8) ; and (2) there was probable cause to arrest Melody, (*id.*, at 9-10). Defendants Pelella and Eatontown join in defendant Brady's arguments, (Br. of Defs. Pelella and Eatontown at 11-19, 27-28), and argue further that the release signed by plaintiff on August 2, 1993, is enforceable and operates to bar plaintiff's claims against them, (*id.*, at 20-27). Plaintiff moves for partial summary judgment on the release and wiretap issues. (Pl.'s Br. in Supp. of Mot. for Partial Summ. J.) Defendants oppose plaintiff's motion and cross-move for partial summary judgment on the wiretap issue.

DISCUSSION

A court shall enter summary judgment when the moving party demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Once the moving party has satisfied this initial burden, the opposing party must establish that a genuine issue of material fact exists. *Jersey Cent. Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1109 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986). The opposing party cannot rest on mere allegations; rather, it must present actual evidence that creates a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (quotation omitted); *Schoch v. First Fidelity Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990). Issues of fact are genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party" *Anderson*, 477 U.S. at 248.

The entire controversy doctrine is founded an the principle that "the adjudication of a legal controversy should occur in one litigation in only one court; accordingly, all parties involved in a litigation should at the very least present in that proceeding all of their claims and defenses that are related to the underlying controversy." *Cogdell v. Hospital Ctr.*, 116 N.J. 7, 15, 560 A.2d 1169, 1172 (1989) (citation omitted).[3] The doctrine has

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[3] The federal courts are "directed to 'give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged.' " *O'Shea v. Amoco Oil Co.*, 886 F.2d 584, 591

three purposes: "(1) the need for complete and final disposition through the avoidance of piecemeal decisions;

(3d Cir. 1989) (quoting *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 (1982)). Under the Full Faith and Credit Clause 28 U.S.C. § 1738, therefore, this Court must apply New Jersey law to determine the preclusive effect of a New Jersey state court disposition. *Printing Mart-Morristown v. Rosenthal*, 650 F. Supp. 1444, 1447 (D.N.J. 1987) (footnote omitted), *aff'd*, 856 F.2d 184 (3d Cir. 1988). In New Jersey, preclusion is governed by the entire controversy doctrine. *Id.*; *see also Bennun v. Rutgers State Univ.*, 941 F.2d 154, 163, 167 (3d Cir. 1991) (in case where plaintiff alleged violations of Title VII and 42 U.S.C. § 1981, court noted that "New Jersey's entire controversy doctrine applies to bar claims in a federal-court when there was a previous state-court action involving the same transaction;" court ultimately held that entire controversy doctrine did not bar plaintiff's federal claims in that case), *cert. denied*, 582 U.S. 1066 (1992); *O'Shea*, 886 F.2d at 591 ("[W]e must determine in this action whether the [New Jersey Franchise Practices Act] claim is barred by New Jersey's entire controversy doctrine.").

In August, 1995, the New Jersey Supreme Court decided "a 'quartet' of entire controversy cases which expanded the doctrine into territory where no doctrine had gone before." *Hulmes v. Honda Motor Co.*, 924 F. Supp. 673, 679 (D.N.J. 1996) (citations omitted). The Court of Appeals for the Third Circuit has not yet addressed these four cases. District courts, however, have applied the expanded doctrine to civil rights cases brought in federal court. *See, e.g., Kelly v. Borough of Sayreville*, 927 F. Supp. 797 (D.N.J. 1996), *aff'd on other grounds*, No. 96-5342, ___ F.3d ___, 1997 WL 92050 (3d Cir. March 5, 1997). In *Kelly*, the Third Circuit did not consider the district court's entire controversy ruling, but noted its "significant reservations concerning the district court's disposition of that issue." *Kelly*, 1997 WL 92050, at *8.

Judge McKee concurred with the decision of the panel, but would have taken the opportunity to define the parameters of the entire controversy doctrine. *Id.* (McKee, J., concurring). Judge McKee noted that the entire controversy doctrine will not

(2) fairness to parties to the action and those with a material interest in the action; and (3) efficiency and the avoidance of waste and the reduction of delay." *DiTrolio v. Antiles*, 142 N.J. 253, 267, 662 A.2d. 494, 502 (1995) (citing *Cogdell*, 116 N.J. at 15, 560 A.2d at 1173).

New Jersey's entire controversy doctrine originally required joinder of "only those claims arising from 'the same overall transaction' involving the parties already named in the lawsuit.' " *Id.* at 266, 662 A.2d at 502 (citing *Crispin v. Volkswagenwerk, A.G.*, 96 N.J. 336, 343-44, 476 A.2d 250 (1984)). In 1989, however, the New Jersey Supreme Court extended the doctrine to mandate joinder of "all parties with a material interest, one that can affect or be affected by the judicial outcome of a legal controversy." *Cogdell*, 116 N.J. at 23, 560 A.2d at 1177 (citation omitted).

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bar a party from raising claims that could not have been brought in the first action. *Id.* at *7 (McKee, J., concurring). Because the hearing examiner refused to hear the plaintiff's constitutional claim, Judge McKee would have held that the district court erred in holding that the plaintiff's suit was barred by the entire controversy doctrine. *Id.* at *6, *8 (McKee, J., concurring).

Here, plaintiff initially brought suit in state court, not an administrative forum. State courts have concurrent jurisdiction with federal courts over § 1983 actions. *Coffman v. Wilson Police Dep't*, 739 F. Supp. 257, 267 (E.D. Pa. 1990). Accordingly, plaintiff could have presented his § 1983 claims in state court. Further, unlike in *Kelly*, the first tribunal did not refuse to hear plaintiff's claims against Brady, Pelella, and Eatontown; indeed, plaintiff did not present the state court with an application for joinder. *See supra*.

In deciding whether successive claims constitute one controversy under the doctrine, "the central consideration is whether the claims against the different parties arise from related facts or the same transaction or series of transactions." *DiTrolio*, 142 N.J. at 267, 662 A.2d at 502 (citation omitted). Thus, it is the "core set of facts that provides the link between distinct claims against the same or different parties and triggers the requirement that they be determined in one proceeding." *Id.* at 267-68, 662 A.2d at 502 (citations omitted). One way to measure whether distinct claims are part of an entire controversy is to determine whether the parties have a "significant interest" in the disposition of a claim. *Id.* (citing *Cogdell*, 116 N.J. at 23, 560 A.2d at 1177).

The entire controversy doctrine does not require commonality of legal issues. *Id.* at 271, 662 A.2d at 504. Rather, the relevant consideration is whether distinct claims are facets of a larger controversy because they arise from interrelated facts. *Id.* The New Jersey Supreme Court has long recognized that "the same set of facts can give rise to discrete causes of action and different kinds of relief." (citation omitted). Thus,

> a controversy between or among persons that arises from a core set of related factual circumstances may trigger different claims against different parties. It is this commonality of facts, rather than the commonality of issues, parties or remedies that defines the scope of the controversy and implicates the joinder requirements of the entire controversy doctrine.

Id. at 272, 662 A.2d at 504.

The polestar of the application of the entire controversy doctrine is judicial fairness. *Id.* at 272, 662 A.2d at 505 (quotation omitted). In the context of party joinder, fairness centers on "basic fairness to all of the parties, especially those sued in the second suit who were prevented from participating in the first." *Id.* at 272-73, 662 A.2d at 505. Thus, fairness is "a protective concept that focuses primarily on whether defendants would be in a better position to defend themselves if the claims against them had been raised and asserted in the first litigation." *Id.* at 273, 662 A.2d at 505.

Courts must also consider fairness to the plaintiff. As with all preclusionary doctrines, application of the entire controversy doctrines requires that "the party whose claim is being sought to be barred must have had a fair and reasonable opportunity to have fully litigated that claim in the original action." *Cafferata v. Peyser,* 251 N.J. Super. 256, 261, 597 A.2d 1101, 1104 (App. Div. 1991) (citations omitted). Therefore, the entire controversy doctrine will not operate to bar unknown or unaccrued claims. *DiTrolio,* 142 N.J. at 273-74, 662 A.2d at 505 (citations omitted). Mandatory joinder is not unfair to a plaintiff, however, where the plaintiff had sufficient information to have included the defendants in the earlier action. *Id.* at 274, 662 A.2d at 505 (citing *Cogdell,* 116 N.J. at 25, 560 A.2d at 1178).

A further consideration in the fairness analysis is whether it is fair to bar the second litigation because the entire controversy doctrine was not followed. *Id.* at 274, 662 A.2d at 506. With the benefit of hindsight, a reviewing court could determine that had the original court been presented with an application for joinder, that court

would have found grounds to excuse joinder. The trial court might have found, for example, that the need for a single adjudication was outweighed by the complexity, confusion, or unmanageability that joinder would create. *Id.* at 274-75, 662 A.2d at 506. This determination, however, is not for the parties to make. Rather, "[i]t is the trial court's responsibility to determine whether or not joinder is appropriate in a given case, and thus litigants should be compelled to bring all actions at one time." *Id.* at 275, 662 A.2d at 506 (citations omitted); *see Cogdell*, 116 N.J. at 27-28, 560 A.2d at 1179 ("Any possible unfairness to litigants, confusion in the presentation of issues, administrative unmanageability, or distortion in the truth-determining process that may result from compulsory joinder of parties – or claims – can be eliminated or at least minimized by a trial court possessed of the discretion to excuse joinder or to order severance."). Thus, a plaintiff who does not allow the trial court the opportunity to manage the entire controversy at the outset will not be heard later to claim that joinder would have been inappropriate. *DiTrolio*, 142 N.J. at 275, 662 A.2d at 506 (citations omitted).

In determining the applicability of the entire controversy doctrine, courts should also consider judicial economy and efficiency. At its most fundamental level, judicial inefficiency is "a duplication of lawsuits, multiple actions each involving the identical controversy and the same witnesses." *Cogdell*, 116 N.J. at 26, 560 A.2d at 1178; *see also DiTrolio*, 142 N.J. at 277, 662 A.2d at 507. However, "the consideration of inefficiency and waste of judicial resources is not negated by the fact that a prior action did not proceed to trial or a judgment on the merits" *DiTrolio*,

142 N.J. at 278, 662 A.2d at 507. Although a court may consider the fact that a case settled or was dismissed without prejudice, neither is dispositive to the application of the entire controversy doctrine. *Id.* at 279, 662 A.2d at 508.

Here, the claims against Dr. Kamm and the defendants in this federal action "arise from related facts or the same transaction or series of transactions." *See id.* at 267, 662 A.2d at 502 (citation omitted). Specifically, it was Melody's telephone call to Dr. Kamm on May 19, 1993, and Dr. Kamm's subsequent report of that call, that resulted in Melody's arrest on May 20, 1993. Indeed, plaintiff highlights the interrelatedness of the facts in his Amended Complaint: "As a result of the alleged statements made by Dr. Kamm, Pelella gave the order to arrest Melody. . . . " (Am. Compl ¶ 16(r); *see also* Uliano Certif., Ex. P: Monmouth County Uniform Crime Report ("Dr. Kaam [sic] stated that Mr. Melody's tone of voice was extremely agitated and she felt that he could be mentally ill or homicidal. She also stated that she believes that he needs to be hospitalized and put on medication.").)

Melody claims that he learned that defendant Brady falsely reported Dr. Kamm's statements during Dr. Kamm's deposition. (Certif. of Russell J. Malta, Ex. C: Dep. of Eugene Melody at 98-99; *see also* Am. Compl. ¶ 16(r) ("[D]uring the depositions of Dr. Kamm in the malpractice action, Dr. Kamm admitted that the statements made up by Brady in the police reports are just that – made up statements, that she never complained that Melody [sic] homicidal or mentally [sic], that he needed to be hospitalized or placed on medication.").) Melody took Dr. Kamm's deposition on May 4, 1994.

(Malta Certif., Ex. J: Dep. of Sharon R. Kamm.) According to plaintiff, Dr. Kamm's deposition

> was the first time Melody became aware that Kamm denied making the statements, and that Brady's report might have been fabricated. It now appeared to Melody that there might have been more to this incident than he had known, and that Pelella, Brady, the Borough and the Police Department might have violated his civil rights.

(Pl.'s Opp'n Br. at 7.)

Despite this knowledge, Melody did not seek to amend the complaint in *Melody v. Kamm* to add Brady, Pelella, and Eatontown as defendants. Rather, plaintiff filed the instant lawsuit an May 18, 1994, two weeks after taking Dr. Kamm's deposition. The action against Dr. Kamm continued for more than four months, and was not dismissed until September, 1994.[4] Thus, Melody "had ample opportunity to have fully litigated" his claims in *Melody v. Kamm;* "he simply chose not to." *See DiTrolio,* 142 N.J. at 274, 662 A.2d at 506 (noting that "only six days passed between the settlement of the first suit and the filing of the complaint in the second suit"). At the time

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[4] Plaintiff emphasizes that *Melody v. Kamm* was dismissed without prejudice. (*See* Pl.'s Opp'n Br. at 8.) A dismissal without prejudice, however, can trigger the application of the entire controversy doctrine to bar a later action. *Hulmes v. Honda Motor Co.,* 924 F. Supp. 673, 683 (D.N.J. 1996) (citing *DiTrolio,* 142 N.J. at 279, 662 A.2d at 508; *Mystic Isle Dev. Corp. v. Perskie & Nehmad,* 142 N.J. 310, 662 A.2d 523 (1995)). Thus, the designation of a dismissal as "with prejudice" or "without prejudice" is "clearly not dispositive of whether a second suit is barred by the entire controversy doctrine." *Id.*

Melody v. Kamm was dismissed, defendants Brady, Pelella, and Eatontown were "known to plaintiff not simply as witnesses but as 'additional parties,' who could have been brought into the action by the filing of an amended complaint." *See id.* at 279, 662 A.2d at 508.

Melody relies on *Hulmes v. Honda Motor Co.*, 924 F. Supp. 673 (D.N.J. 1996), to support his argument that the entire controversy doctrine should not apply to bar this action. (Pl.'s Opp'n Br. at 15-16, 18.) The issue in *Hulmes* was whether a

> voluntary, but admittedly inadvertent, dismissal "with prejudice" of a State court "John Doe" action, in which only a fictitious defendant was named, one week after it was filed, and before the complaint was served or any discovery conducted, amounts to a "prior action" within the meaning of the entire controversy doctrine so as to bar this suit against a manufacturer of an allegedly defective product, not named or otherwise identified in the original "John Doe" complaint.

Id. at 676 (footnotes omitted). Confronted with these facts, the court could not conclude that the New Jersey Supreme Court would apply the doctrine. *Id.* at 683.

The Court fails to see the applicability of *Hulmes* to the case at hand. Melody's state court action against Dr. Kamm was not a "John Doe" action. The lawsuit was filed on October 25, 1993, and was not dismissed until September, 1994, almost a year later. Moreover, during that time, the parties conducted fairly extensive discovery. Significantly, plaintiff took the deposition of Officer Brady, one

of the defendants in this later-filed action.[5] *Compare DiTrolio*, 142 N.J. at 278, 662 A.2d at 507-08 ("Although the weight of the economy factor lessens when a case is dismissed soon after the complaint is filed, here, we are presented with a case that witnessed one year of vigorous pretrial litigation, including fairly extensive discovery, and involved the respective parties, numerous attorneys and various witnesses before it ultimately settled."), *with Hulmes*, 924 F. Supp. at 683 ("In the present case, the judicial economy factor 'lessens' almost to the vanishing point, because the suit was dismissed only one week after it was filed, and no discovery was ever conducted."). Thus, the facts of the instant case are wholly inapposite to those of *Hulmes*.

Plaintiff also argues that "it would have been unfair to the litigants in this matter and would jeopardize a clear

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[5] In *DiTrolio*, the defendants in the second action were deposed as witnesses during the discovery period of the first action. 142 N.J. at 273, 662 A.2d at 505. The New Jersey Supreme Court noted that

> [a]lthough they were represented by counsel during these depositions, had they been made parties to the original action, they might have approached the depositions and discovery process differently. They would have been able actively to participate in discovery by objecting to interrogatories and requests for documents. Moreover, they would have been able to engage in discovery of their own. Thus, it is clear that their inability to participate as parties in the first trial affects their position in the second, relative to that of the plaintiff, especially in the instance where many of the facts and much of the evidence are the same in both actions.

Id. (citation omitted).

presentation of the issues and a just result if all three of these matters [*Melody v. Kamm, Melody v. Melody,* and *Melody v. Borough of Eatontown, et al.*] were joined into one." (Pl.'s Opp'n Br. at 25.). According to Melody, it "would have been inequitable to embroil the litigants in the earlier lawsuits in this complex federal litigation." (*Id.* at 26.) This determination, however, is not for plaintiff to make. *See DiTrolio,* 142 N.J. at 275, 662 A.2d at 506 ("[T]he joinder determination does not repose with the parties."). Melody's failure to allow the New Jersey Superior Court to manage the full controversy at the outset diminishes the force of his present claim that joinder would have been inappropriate. *See id.* (citations omitted); *see also Petrocelli v. Daniel Woodhead Co.,* 993 F.2d 27, 31 (3d Cir. 1993) ("Under the entire controversy doctrine, . . . courts and not private parties have the authority to decide whether equitable considerations justify separate trials.").[6]

Accordingly, because this action is barred by the entire controversy doctrine, the Court shall grant the motion for summary judgment by defendants Brady, Pelella, and the Borough of Eatontown.[7]

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[6] Melody also argues that New Jersey's entire controversy doctrine violates equal protection in that it treats New Jersey residents differently from other groups of people. (Pl.'s Opp'n Br. at 23.) Plaintiff offers absolutely no support for this novel theory, and the Court does not address it.

[7] Plaintiff has also named the Eatontown Police Department as a defendant in this action. (*See* Am. Compl.) According to defendant Eatontown, the Eatontown Police Department has not been served with the Summons and Complaint in this matter. (Reply Br. of Defs. Pelella and

IT IS, therefore, on this 26th day of March, 1997, **ORDERED** that the motion of defendant Jerome Brady for dismissal or, in the alternative, for summary judgment be and hereby **GRANTED;** and

IT IS FURTHER ORDERED that the notion of defendants Joseph Pelella and the Borough of Eatontown for dismissal or, in the alternative, for summary judgment be and hereby is **GRANTED;** and

IT IS FURTHER ORDERED that the motion for partial summary judgment by plaintiff Eugene Melody be and hereby is **DENIED;** and

IT IS FURTHER ORDERED that the motion for partial summary judgment by defendants Borough of Eatontown, Joseph Pelella, and Jerome Brady be and hereby is **DISMISSED AS MOOT.**

/s/ Mary Little Parell
MARY LITTLE PARELL
United States District Judge

Eatontown at 1-2.) Eatontown also argues that the interests of the Eatontown Police Department are subsumed by those of the Borough. (*Id.* at 2.) The Court finds that plaintiff's action against the Eatontown Police Department is barred for the same reasons that his action against Eatontown is barred.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 97-5204

EUGENE MELODY
Appellant

v.

BOROUGH OF EATONTOWN; EATONTOWN POLICE DEPARTMENT; JOSEPH PELELLA, CHIEF, individually and under color of State law; JOHN DOES, 1-100; JANE DOES, 1-100; MARK ROES, 1-100 (unnamed conspirators); JEROME BRADY, LT., (then Det. Sgt.), individually and under color of State law; MARY ROES, 1-100, unnamed conspirators

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On Appeal from the United States District Court
For the District of New Jersey
(D.C. Civil Action No. 94-cv-02453)
District Judge: Honorable Mary Little Parell

Argued March 13, 1998

BEFORE: STAPLETON and ALITO, *Circuit Judges*, and O'KELLEY,* *District Judge*

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* Hon. William C. O'Kelley, United States District Judge for the Northern District of Georgia, sitting by designation.

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ORDERED AND ADJUDGED that the judgment of the district court entered March 26, 1997, be and the same is hereby affirmed.

Costs taxed against appellant.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

ATTEST:

/s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

DATED: APR 14 1998

Certified as a true copy and issued in lieu of a formal mandate on June 10, 1998.

Teste: /s/ Illegible

Chief Deputy Clerk,
U.S. Court of Appeals
For the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 97-5204

EUGENE MELODY
Appellant

v.

BOROUGH OF EATONTOWN; EATONTOWN POLICE DEPARTMENT; JOSEPH PELELLA, CHIEF, individually and under color of State law; JOHN DOES, 1-100; JANE DOES, 1-100; MARK ROES, 1-100 (unnamed conspirators); JEROME BRADY, LT., (then Det. Sgt.), individually and under color of State law; MARY ROES, 1-100, unnamed conspirators

---

SUR PETITION FOR REHEARING

BEFORE: BECKER, *Chief Judge*, SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, McKEE, and RENDELL, *Circuit Judges*, and O'KELLEY,* *District Judge*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges

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* Hon. William C. O'Kelley, U. S. District Judge for the Northern District of Georgia, was a member of the original panel. His vote is limited to panel rehearing only.

who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,
/s/ Walter K. Stapleton
Circuit Judge

DATED: JUN - 2 1998

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

Article IV, ¶ 1 of the United States Constitution provides as follows:

Full faith and credit to records and judicial proceedings of states. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Article VI, Cl. 2 of the United States Constitution provides as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

42 U.S.C. § 1983 provides as follows:

Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer

for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1985 provides as follows:

(1) Preventing officer from performing duties. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment lawfully asserted to by him, or of his being or having been such

juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an

action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

25 U.S.C. § 1738 provides as follows:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certifying officer of any such court, made pursuant to law, on file in any department or agency of the United States and relating to such case or matter, shall, on being filed in the court to which it relates, have the same effect as an original paper filed in such court. If the copy so filed discloses the date and amount of a judgment or decree and the names of the parties thereto, the court may enforce the judgment or decree as though the original record had not been lost or destroyed.

(b) Whenever the United States is interested in any lost or destroyed records or files of a court of the United States, the clerk of such court and the United States attorney for the district shall take the steps necessary to restore such records or files, under the direction of the judges of such court.

(2)

FILED
SEP 21 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-307

In The

Supreme Court of the United States

October Term, 1997

EUGENE MELODY,

Petitioner,

vs.

BOROUGH OF EATONTOWN; EATONTOWN POLICE DEPARTMENT; JOSEPH PELELLA, CHIEF, Individually and Under Color of State Law; JOHN DOES, 1-100; JANE DOES, 1-100; MARK ROES, 1-100, Unnamed Conspirators; JEROME BRADY, LT., (THEN DET. SGT.), Individually and Under Color of State Law; MARY ROES, 1-100, Unnamed Conspirators,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the courts below correctly applied relevant New Jersey state law in dismissing petitioner's federal complaint following the dismissal of prior state court actions arising out of the same factual circumstances.

2. Whether the courts below correctly applied New Jersey law in giving preclusive effect to prior related state court proceedings which were voluntarily dismissed by the petitioner even though the proceedings were concluded without trial.

3. Whether the decision of the court below to dismiss plaintiff's complaint by giving the previously concluded state court proceedings the same preclusive effect in the federal court as the New Jersey courts would have given them is in conflict with this court's decision in *Migra v. Warren City School District, Bd. of Ed.*, 465 U.S. 75 (1984), and with other decisions of the various courts of appeals.

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STATEMENT OF THE CASE

Contrary to petitioner's description of this matter, this case is nothing more than a claim for alienation of affection dressed in the clothing of a civil rights case because of the occupation of defendant Pelella. The background which gives rise to this litigation will make this clear.

In November of 1992 the petitioner first learned that his wife, Diane Melody, intended to leave him because of an affair which she was having with Joseph Pelella. From November 1992 through May 1993 (and beyond), the petitioner was involved in a contentious divorce with Diane Melody. During this period of time there was considerable friction between the petitioner and Diane Melody and Joseph Pelella. This including signing criminal complaints and making reports to the police by both Mr. and Mrs. Melody, one against the other. App. 2-3.

On May 19, 1996 the petitioner became enraged at Joseph Pelella as a result of a conversation he had with one of his children that evening. Petitioner went to Eatontown Police Headquarters to confront Pelella. App. 353-355. He was admittedly upset and intense. When he failed to find Pelella at Headquarters, he went to the Pelella residence and had a confrontation with Sheryl Pellella (Pelella's wife). The petitioner told Mrs. Pelella, among other things, that he would "put him (Pelella) in the hospital."

Jerome Brady assisted Officer Richard Coffey in investigating this incident. In that connection he witnessed formal written statements given by Sheryl Pelella and Arlene Holiday. Based upon these statements and his investigation, Officer Coffey signed a complaint against Melody charging him with terroristic threats contrary to N.J.S.A. 2C:12-3. Based upon this complaint Officer Coffey, along with Detective Brady,

placed petitioner Melody under arrest. The arrest was effectuated in a courteous manner without incident. A few hours later petitioner Melody was released on bail. At the time of his arrest petitioner had been the Eatontown Municipal Prosecutor for approximately ten years and he was well versed in the standard operations of the department. The Eatontown police (who were well acquainted with petitioner professionally and socially) allowed petitioner free access and use of telephones.

In light of the above, petitioner had both explicit and actual knowledge of and explicit and actual notice of the fact that all of his telephone calls made from within the defendant, Borough of Eatontown's Police Department following his arrest were being automatically tape recorded on the Department's master reel-to-reel tape. Moreover, there are multiple signs conspicuously posted, informing all employees, visitors, and inmates of the monitoring and recording of all telephone calls. Because the conversations were relevant to the criminal charges, Pelella had a copy of the tape forwarded to the Monmouth County Prosecutor's Office.

As a result of negotiations between petitioner's criminal defense attorneys and Pelella (acting pro se), the criminal complaint against him was dismissed in August 1993. Petitioner, a licensed New Jersey attorney since 1980, executed a civil release as to all claims arising from his arrest. Appendix to Third Circuit, pp. 673 and 813. The petitioner received copies of all the police reports (including the May 20, 1993 report of Jerome Brady) relating to any and all interactions between himself and any member of Eatontown Police Department by September 10, 1993. After receiving copies of those police reports petitioner wrote a letter dated September 10, 1993 to Dr. Sharon Kamm threatening to file a lawsuit against her unless she retracted the statements which she had made to Detective Brady on May 20, 1993. App. 200-201. On October 25, 1993

petitioner filed a complaint pro se against Dr. Kamm concerning the statements which she had made to Sgt. Brady on May 20, 1993.[1] App. 203-204.

On December 3, 1993, petitioner filed a civil action in Monmouth County Superior Court against Diane Melody (subsequently amended) alleging that his now ex-wife had "willfully intercepted and recorded telephone calls from the plaintiff/appellant", in violation of N.J.S.A. 2A:156A-1, *et seq.* App. 5. The Complaint explicitly implicates Pelella in this cause of action. The cause of action was eventually dismissed with prejudice on March 20, 1995. App. 5.

The petitioner personally conducted the deposition of Jerome Brady as a non-party witness in the case of *Melody v. Kamm* on April 20, 1994. The petitioner then personally conducted the deposition of Dr. Kamm on May 4, 1994. The entire conduct of the Kamm case was a strategic maneuver by petitioner to gain a litigation advantage over Pelella and others while they were not parties to the case.

The petitioner testified below that it was as a result of the deposition of Dr. Kamm that he came to believe that the information contained in Brady's report that was attributed to her was false. This lawsuit, containing allegations against Pelella and Brady with respect to their participation in the investigation of the criminal complaint against the petitioner was filed on May 18, 1994. Petitioner's suit against Dr. Kamm was dismissed in September 1994. App. 4.

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1. It should be noted that petitioner erroneously asserts that Dr. Kamm's statements formed the basis of his arrest. In actuality the arrest was based on the statements of Mrs. Pelella and Ms. Haliday which were taken before the arrest. Brady did not interview Dr. Kamm until after the petitioner had been arrested and released.

Contrary to petitioner's assertions in his petitions, all of his arguments were presented to the district court which completely considered and rejected them. Likewise, the Third Circuit panel was fully briefed on all of the issues now asserted by the petitioner and entertained extensive oral argument on the matter. After careful and thorough consideration, the Third Circuit found the appeal to be so entirely lacking in merit that it affirmed the district court's judgment by judgment order. Both petitions for rehearing were likewise summarily rejected. These determinations do not reflect a lack of diligence on the part of district court and Third Circuit as petitioner asserts, but rather demonstrate the utter lack of merit of petitioner's position.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR *CERTIORARI* SHOULD BE DENIED WHERE THE ONLY ISSUE IS WHETHER OR NOT THE DISTRICT COURT CORRECTLY APPLIED NEW JERSEY LAW TO GIVE PRECLUSIVE EFFECT TO THE PRIOR NEW JERSEY STATE COURT PROCEEDINGS.

The petitioner argued strenuously below, before both the District Court and the Third Circuit, that 42 U.S.C. § 1983 prevents a prior state court proceeding from barring a subsequent civil rights action in Federal Court where the plaintiff had not actually raised his civil rights claim in the prior state court action. The first six pages of the legal argument of this petition under two sub-headings make the same argument before conceding the correct principal of law which applies to this case. Petitioner's brief at p. 16. Even then the petitioner states the holding in a weak and backhanded manner. To state

the law correctly (in this Court's own words): "We must reject the view that Section 1983 prevents the judgment in petitioner's state court proceeding from creating a claim preclusion bar in this case." *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 84 (1984). Prior proceedings in state court must be given the same preclusive effect in federal court that such proceedings would have been given in the state court in which the prior case arose. *Id.* at 85. The Supreme Court followed that course precisely in *Migra* by then turning to a review and analysis of Ohio's law of claim preclusion. *Id.* at 85-87.

The only issue (as Point I(c) of the petition implicitly concedes) is whether or not the district court correctly applied New Jersey law in giving preclusive effect to petitioner's prior state court proceedings in dismissing the federal complaint. As such, this case is unworthy of a writ of *certiorari* regardless of the correctness of the district court and the Third Circuit in determining that New Jersey would have given preclusive effect to the prior proceedings. *See* Supreme Court Rule 10. Although the rules do not control the court's discretion in this matter, the writ should be "rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." *Id.* In this case the district court correctly stated the applicable rule of law: "Under the Full Faith and Credit Clause 28 U.S.C. § 1738, therefore, this court must apply New Jersey law to determine the preclusive effect of a New Jersey state court disposition." *Parell Memorandum*, App. 8, n.3.

Virtually the entire Discussion portion of Judge Parell's Memorandum consists of a careful and thorough analysis of New Jersey's Entire Controversy Doctrine and its application to the particular facts of the case at bar. Although we demonstrate below that the district court's decision was correct, even if we assume *arguendo* that the district court erred in its

application of this law to the specific facts of this case (and that the court of appeals erred in its summary affirmance), that does not supply a sufficient basis to support the grant of a writ of *certiorari*.

II.

THE DISTRICT COURT CORRECTLY APPLIED NEW JERSEY'S ENTIRE CONTROVERSY DOCTRINE IN DISMISSING PLAINTIFF'S COMPLAINT WHERE PLAINTIFF VOLUNTARILY TERMINATED PRIOR PROCEEDINGS IN STATE COURT INVOLVING THE SAME CONTROVERSY.

On August 1, 1995 the highest court of New Jersey issued not one but four separate opinions applying the entire controversy doctrine to bar subsequent or successive lawsuits in a variety of contexts and factual circumstances. *DiTrolio v. Antiles*, 142 N.J. 253, 662 A.2d 494 (1995); *Circle Chevrolet v. Giordano, Halloran & Ciesla*, 142 N.J. 280, 662 A.2d 509 (1995); *Mystic Isle Development Corp. v. Perskie & Nehmad*, 142 N.J. 310, 662 A.2d 523 (1995); and *Mortgageling Corp. v. Commonwealth Land Title*, 142 N.J. 336, 662 A.2d 536 (1995). Simply stated, the entire controversy doctrine as applied by the State of New Jersey mandates the joinder of all claims and all parties with a material interest in a particular legal controversy in a single litigation in one court. *DiTrolio*, *supra*, at 253. Although the doctrine had long been applied to different claims involving parties already named in a particular lawsuit (*see, e.g., Crispin v. Volkswagen Werk, A.G.*, 96 N.J. 336, 476 A.2d 250 (1984)), New Jersey first extended the doctrine to mandate the joinder of all interested parties more recently, in 1989. *Cogdell v. Hospital Ctr.*, 116 N.J. 7, 23, 560 A.2d 1169 (1989).

As the four cases decided in 1995 make clear, it has been the law of New Jersey since 1989 that a plaintiff who omits parties in an earlier action will be precluded from bringing a successive action against those parties where the claims constitute one controversy for the purposes of the doctrine. *DiTrolio, supra*. The district court found, and petitioner presented nothing to refute, that his federal action bases its claims on the same controversy which formed the basis of petitioner's state court litigation. App. 13-15 and App. 4-5.

The New Jersey Supreme Court stated that

> [i]n determining whether successive claims constitute one controversy for purposes of the doctrine, the central consideration is whether the claims against the different parties arise from related facts or the same transaction or series of transaction.

Id. (citations omitted). The court emphasized that "[i]t is the core set of facts that provides the link between distinct claims against the same or different parties and triggers the requirement that they be determined in one proceeding." *Id.* at 267-68. It is the relationship between the facts which support the two different complaints, rather than any technical difference in the causes of action (whether they be in law or equity) that brings the separate complaints within the purview of the entire controversy doctrine. *Id.* at 269.

> The entire controversy doctrine does not require commonality of legal issues. Rather, the determinative consideration is whether distinct claims are aspects of a single larger controversy because they arise from interrelated facts.

Id. at 271. Furthermore,

> A controversy between or among persons that arises from a core set of related factual circumstances may trigger different claims against different parties. It is the commonality of facts, rather than the commonality of issues, parties or remedies that defines the scope of the controversy and implicates the joinder requirements of the entire controversy doctrine.

Id. at 272.

The petitioner places particular emphasis on the assertion that the case of *Melody v. Kamm* was dismissed without prejudice in arguing that the district court erred in its application of the entire controversy doctrine to this case. However, law on the doctrine is directly contrary to this proposition. Where a plaintiff intentionally manipulates the judicial system and fragments litigation in order to obtain a strategic advantage over other parties, the principles underlying the entire controversy doctrine mandate that the subsequent suit be barred even though the prior proceeding was dismissed without prejudice. *Mystic Isle*, *supra*, 142 N.J. at 333, 662 A.2d 523 (1995). In that case the plaintiff "deliberately contrived to have one claim dismissed in the Atlantic County action in order to circumvent the preclusive effect of the entire controversy doctrine." *Id.* The court also noted that the plaintiff had demonstrated no intention of continuing the action which had been dismissed without prejudice. *Id.* at 334.

It is clear from the record that the plaintiff was already contemplating making claims based upon alleged illegal wire tapping and false arrest. A review of the manner in which the depositions themselves were conducted and the questions which the petitioner (at the time *pro se*) asked, provides further compelling evidence that the Kamm lawsuit was but one

element of a larger design to bring far more comprehensive claims against other parties not named in that lawsuit. This is what the entire controversy doctrine is expressly designed to prohibit. Petitioner attempted to make the *Melody v. Kamm* case but a single inning, rather than the entire ball game, contrary to New Jersey's entire controversy doctrine. *Circle Chevrolet, supra*, 142 N.J. at 289.

Even if the various actions allege different causes of action in law and equity, if the factual bases of the actions are the same, the plaintiff cannot fractionalize his litigation in order to save the second suit from dismissal.

The facts of this case are almost identical with those in *DiTrolio*. In the first proceeding involved in that case the plaintiff entered into a stipulation of settlement with the original party defendants, filed a dismissal without prejudice and explicitly stated in their written settlement agreement that the stipulation was not to prevent the plaintiff from pursuing other actions against other individuals who were not defendants in the first suit. *DiTrolio, supra*, 142 N.J. at 265, 662 A.2d 494. The plaintiff attempted to explicitly preserve his later suit against individual defendants who had been represented as witnesses in the earlier proceeding. *Id.* Thus, in two separate decisions of the highest court of New Jersey a dismissal without prejudice in prior proceedings was sufficient to invoke claim preclusion against plaintiffs in subsequent proceedings. The petition's assertion that this is contrary to New Jersey law is a blatant misstatement.

III.

THE OPINION OF THE DISTRICT COURT AND THE JUDGMENT ORDER OF THE COURT OF APPEALS BELOW DO NOT CONFLICT WITH THE DECISIONS OF ANY COURT OF APPEAL NOR WITH THE RELEVANT DECISIONS OF NEW JERSEY'S COURT OF LAST RESORT.

Context is essential to meaning, and taking statements out of context can seriously distort meaning. In the extreme case, taking a statement out of context can pervert the intended meaning of a statement to its exact opposite. Point II of the petition is a textbook example of this extreme form of distortion.

As explained in Point I of this brief, supra, the district court correctly stated that it was obliged to apply New Jersey law to determine the preclusive effect of the prior New Jersey state court proceedings in order to determine the outcome of the motions before it. App. 8, n.3.[2] As this brief pointed out in Point I, supra, (and as petitioner essentially concedes, this court's decision in *Migra*, so holds and controls. Petition, 16-17.) The case is cited in the petition as conflicting with the decision below does not in fact conflict.

The petition relies on *Venuto v. Witco Corp.*, 117 F.3d 754 (3rd Cir. 1997), and cases cited therein to support the argument that a dismissal without prejudice does not operate to preclude a subsequent action. Petition at 22. This is far too broad a description of that case. The Third Circuit in the *Venuto* decision

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2. The petition criticizes the district court for placing this analysis in a footnote as if the court's footnote constituted no part of its decision. On the contrary, relegating this portion of the decision to a footnote was appropriate since it constitutes black letter law which should not require further explication.

explicitly recognized that under certain circumstances New Jersey **does** give preclusive effect to prior litigation dismissed without prejudice. 117 F.3d at 762. However, the court applied the law set forth in *Mystic Isle* to the particular facts of the *Venuto* case. *Id.* The court found that the plaintiff in that case "complied with the dictates of the Entire Controversy Doctrine and undertook to present all claims for the court's decision on how best to structure the litigation." Because the trial court itself had decided (over plaintiff's objection) that the claims should be determined in separate suits, this did not form a basis for the application of the Entire Controversy Doctrine. *Id.* Obviously, those are not the facts of this case. The petitioner did not seek to bring his claims in the earlier state court proceedings, much less obtain the express authorization from the state court to preserve his other claims. Rather, he unilaterally withheld his claims from the first action, consented to dismissal of the first action and sought to bring his claims in a separate proceeding. Under these circumstances, the highest court of New Jersey **does** apply preclusive effect to the earlier proceeding, despite its having been dismissed "without prejudice." Point II, *supra*.

The cases from other jurisdictions referred to in the petition are likewise unavailing to the petitioner. In *Guzowski v. Hartman*, 849 F.2d 252, 255 (6th Cir. 1988), the case was one involving federal law and therefore the court applied federal *res judicata* rules. In *Hapgood v. City of Warren*, 127 F.3d 490, 493 (6th Cir. 1997), the case involved the application of a prior state court proceeding and therefore the court applied the claim preclusion law of Ohio in rendering its decision. That is precisely what the district court did in this case.

In the Seventh Circuit case cited by petitioner, the Court of Appeals likewise applied Illinois State law in order to determine the effect that the prior state proceeding would have

on the pending federal case. *Torres v. Rebarchak*, 814 F.2d 1219, 1223 (7th Cir. 1987). The Second Circuit case relied on by petitioner, *Stolberg v. Trustees for the State Colleges of Connecticut*, 541 F.2d 890 (2d Cir. 1976), does not even implicate the full faith and credit doctrine. In that case the Court of Appeals found that no second or different action had been brought. *Id.* at 893. The court determined that the petition being reviewed was an enforcement of the prior judgment already entered, and not a separate proceeding. *Id.*

The Fifth Circuit case referenced in the petition is *United States v. Seckinger*, 408 F.2d 146 (5th Cir. 1954), *rev'd on other grounds*, 397 U.S. 203 (1970). That case involved the application of federal law. *Id.* at 149. Therefore, its holding can have not application to this case which requires the application of New Jersey law.

Without belaboring the argument, the same can be said for all of the cases cited by the petitioner. To the extent that any case can be read to apply some law other than the law of the jurisdiction in which the first proceeding took place in giving effect to that proceeding, it would be inconsistent with this court's explicit holding in *Migra*, *supra*, and therefore must be disregarded.

IV.

NEW JERSEY'S ENTIRE CONTROVERSY DOCTRINE IS SUBSTANTIVE LAW AND NOT PROCEDURAL AND IT DOES NOT VIOLATE THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

Contrary to petitioner's unsupported assertion, it is settled that New Jersey's Entire Controvery Doctrine is one of

substantive law. *Rycoline Products v. C&W, Unlimited*, 109 F.3d 833, 887 (3rd Cir. 1997). The explicit finding of the *Rycoline* case is implicit in subsequent federal court decisions which afford preclusive effect to prior New Jersey State Court proceedings pursuant to the Entire Controversy Doctrine. *See, e.g., Printing Mart-Morristown, Inc. v. Rosenthal*, 650 F. Supp. 1444, 1447 (D. N.J. 1987), *aff'd*, 856 F.2d 184 (3rd Cir. 1988); *O'Shea v. Amaco Oil Co.*, 886 F.2d 584 (3rd Cir. 1989).

It should be noted that although most of the cases speak in terms of "judgments," both Article IV, Paragraph 1 of the United States Constitution and 25 U.S.C. § 1738 speak in terms of "judicial proceedings." App. 23 and App. 26. If anything, the application of Section 1738 by the United States Supreme Court has been an expanding one, rather than a narrow one. *See, e.g., Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 116 S. Ct. 873 (1996). As the courts below found absolutely no merit to petitioner's arguments that the Entire Controversy Doctrine violates the constitution on equal protections grounds (App. 17), this Court should reject petitioner's unsupported and novel theory (raised for the first time in this Petition) that the application of the full faith and credit clause and the full faith and credit act violate the supremacy clause.

CONCLUSION

For the reasons stated above, the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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